

January 18, 2013

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Dear Ms. Walli:

**Hydro One Transmission Rates 2013-2014 (EB-2012-0031)  
Procedural Matters**

We are counsel to the Association of Power Producers of Ontario ("APPrO") in the above-noted proceeding. In accordance with Procedural Order No. 8, please find attached the submissions of APPrO on the process for the oral hearing of the concurrent expert witness panel. We are providing this letter (and submission) in advance of the submission deadline so that parties can have the benefit of our position when making their submissions on January 22<sup>nd</sup>.

As discussed with Board staff and counsel for the IESO earlier this week, the APPrO witness from Brookfield (Marc-André Laurin) will be out of the country for the week of January 28<sup>th</sup> (when the hearing is currently scheduled). This was simply an unfortunate scheduling mix-up on our end. For that reason, we are requesting that the Board provide for one of the following forms of relief:

- Adjourn the Oral Hearing to February. We have discussed this with the IESO, and the IESO is supportive of this adjournment. APPrO believes there are other grounds (other than Mr. Laurin's availability) for an adjournment: (a) there is no pressing need to have the export transmission service ("ETS") issue resolved; and (b) as the schedule now stands, the Board would not be able to issue a decision on the procedure to be followed at the oral hearing until January 23<sup>rd</sup> at the earliest (and more likely the 24<sup>th</sup> or 25<sup>th</sup>). This will leave the parties with one business day to prepare their witnesses and prepare cross-examination with full knowledge of the order and composition of the witness panels.
- Schedule a Third Hearing Day: A third hearing day would enable the Board to complete any examination not completed by the end of the day on January 29<sup>th</sup>, and have an APPrO witness panel convened for cross-examination.
- Allow for Alternate Brookfield Witness: Mr. Laurin's evidence is, in essence, "company evidence", meant to support APPrO's expert evidence on the issue of trader behaviour in the absence of perfect information. This is not knowledge unique to Mr. Laurin, and his evidence (including interrogatory responses) could be adopted by a number of traders at Brookfield or other APPrO member companies. To that end, APPrO could have Mr. Richard Bordeleau (Senior Vice-President, Trading, Brookfield Energy Marketing LP) adopt Mr. Laurin's evidence and be available for cross-examination. We would provide Mr. Bordeleau's curriculum vitae in advance of the proceeding.

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The other potential option is, if no party has cross-examination for Mr. Laurin, to simply allow Mr. Laurin's evidence to stand "as is" in the record. However, this would require consent of the other parties to this proceeding.

Please feel free to contact me should you have any questions.

Yours very truly,

***Original signed by***

Richard King  
Partner

RK/mnm

Enclosure

Cop(y/ies) to: All Parties to EB-2012-0031

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended;

**AND IN THE MATTER OF** a review of an application filed by Hydro One Networks Inc. for an order or orders approving a transmission revenue requirement and rates and other charges for the transmission of electricity for 2013 and 2014

**SUBMISSIONS OF ASSOCIATION OF POWER PRODUCERS OF ONTARIO (APPrO)****REGARDING****PROCEDURE FOR HEARING THE CONCURRENT EXPERT WITNESS PANEL**

1. In Procedural Order No. 8 of this proceeding, the Board made provision for an Experts' Conference under Rule 13A of the Board's *Rules of Practice and Procedure* (the "Rules") in respect of the remaining unsettled issue (i.e., Issue 23: What is the appropriate level for Export Transmission Rates in Ontario?).
2. The Board's expert evidence requirements, as set out in Procedural Order No. 8, apply to the evidence of:
  - (a) Charles River Associates ("CRA"), for the Independent Electricity System Operator ("IESO");
  - (b) Navigant Economics ("Navigant"), for APPrO; and,
  - (c) Elenchus Research Associates, for HQ Energy Marketing Inc. ("HQEM").

3. In accordance with Procedural Order No. 8, the experts participated in the pre-hearing Experts' Conference (held December 12 and 13, 2012) and filed a Joint Written Statement (on January 16, 2013).
4. With respect to the oral hearing, Procedural Order No. 8 states that the experts will appear together as a concurrent expert witness panel "for the purposes of answering questions from the Board and other parties, as may be permitted by the Board, and providing comments on the views of the other experts on the same panel." Procedural Order No. 8 goes on to invite all parties to this proceeding to make submissions "with respect to the most appropriate procedure for the oral hearing of the concurrent expert witness panel in light of the objectives of the Board as expressed herein and in Rule 13A of the Board's Rules."
5. These are the submissions of APPrO regarding the procedure for the oral hearing of the evidence of the concurrent expert witness panel. Given that there is related non-expert evidence (i.e., company evidence) in this proceeding, this submission provides APPrO's views on the appropriate order and composition of all witness panels in this proceeding.
6. APPrO makes these submissions having regard to:
  - (a) the potential objectives of the Board, as set out in Procedural Order No. 8 and section 13A of the Board's Rules;
  - (b) the other (non-expert) evidence on the record in this proceeding; and,
  - (c) past practice of the Board in hearing concurrent expert witness panels.

### **Objectives of the Board**

7. Procedural Order No. 8 does not specifically set out the Board's objectives with respect to the concurrent expert witness panel at the oral hearing, except to say that the panel would be available to answer questions from the Board and other parties (as may be permitted by the Board), as well as provide comments on the views of the other experts on the same panel.
8. However, the stated purpose of the pre-hearing Experts' Conference and Joint Written Statement (as set out in both Procedural Order No. 8 and the Board's Rules) was to:  
(a) identify and narrow the relevant issues; (b) identify important points of agreement and disagreement among the experts; and (c) explain the reasons for disagreement.
9. Rule 13A.02 of the Board's Rules sets out the general objective when it comes to expert evidence – namely, that an expert “shall assist the Board impartially by giving evidence that is fair and objective.”
10. Based on these provisions from both Procedural Order No. 8 and Rule 13A, APPrO submits that the Board's objectives in respect of the concurrent expert witness panel include:
  - (a) assisting the Board Panel in understanding the key issues addressed by the expert evidence;
  - (b) understanding the experts' position on those key issues (and where the experts agree and do not agree);

- (c) assisting the Board understand the reasons for any disagreement on the key issues; and,
  - (d) ensuring that (a), (b) and (c) are done in a manner that is impartial, fair and objective.
11. **On that basis, APPrO submits that the concurrent expert witness panel consist solely of independent experts (i.e., no company witnesses sit as part of the panel).**
12. **Moreover, we understand that HQEM will request that their experts from Elenchus be permitted to sit as a separate witness panel (i.e., that they be excluded from the concurrent expert witness panel). APPrO has no objection to this.**
13. Whereas APPrO's expert evidence directly addresses the expert evidence of CRA in this proceeding, HQEM's expert evidence comes at the issue of the export transmission service ("ETS") charge in an entirely unrelated manner. There is no overlap of evidence (and consequently no areas of agreement or disagreement) between HQEM experts on the one hand, and APPrO's and the IESO's on the other hand. This was reflected in the Joint Witness Statement filed on January 16, 2013.

### **Role of Non-Expert Testimony**

14. In addition to the experts, APPrO filed the evidence of a power trader from Brookfield in this proceeding (Marc-André Laurin). This evidence is APPrO's "company evidence", and interrogatories were asked and answered on the Brookfield evidence.
15. APPrO structured and filed its evidence on Issue 23 in this proceeding in a coordinated manner, as an integrated "package" of evidence. The Navigant evidence references the Brookfield evidence (see section V(a) of the Navigant evidence), which is meant to be

supportive of the Navigant evidence. Specifically, one of the Navigant critiques of the expert study filed by the IESO (the “CRA Study”) is that the model that is the basis of the CRA Study assumes perfectly efficient trading behaviour (and fails to take into account that traders do not buy and sell power in a perfectly efficient environment). The Brookfield witness evidence is provided to support Navigant’s critique on this point. The evidence is based on Mr. Laurin’s expertise and knowledge about how power trading decisions are made in practice, in the absence of perfect information. This is one key element of APPrO’s case in this proceeding. The APPrO evidence was organized in this manner on the assumption that APPrO would present a witness panel consisting of Navigant and Brookfield witnesses.

16. **Given the integrated nature of APPrO’s expert and company evidence, APPrO submits that the concurrent expert witness panel should not prejudice or preclude APPrO’s right to sit a witness panel (subsequent to the concurrent expert panel) comprised of its witness from Navigant and its witness from Brookfield.**
17. Apart from the Brookfield evidence, all of the other evidence in this proceeding is expert evidence. No other Party has provided non-expert evidence, including the IESO. It is APPrO’s understanding, however, that the IESO and/or Board staff might propose having Mr. Darren Finkbeiner sit as a witness for the IESO at the oral hearing, in order to assist the Board better understand the export transmission service (“ETS”) issue. Mr. Finkbeiner participated in the Technical Conference in this proceeding on that basis. APPrO has some concerns with this potential proposal, which are set out below.
18. The last time that the ETS issue came before the Board (EB-2010-0002), the IESO did provide its own evidence (in addition to its expert evidence), and took a position on the

appropriate ETS level at the outset of the hearing (maintenance of the ETS at \$1/MWh). The IESO has chosen not to do so in this case.

19. In EB-2010-0002, CRA prepared an expert report which analyzed the impact of various tariff options on the Hourly Ontario Energy Price (HOEP), export revenues, export and import volumes, and market efficiency (i.e., total consumer and producer surplus). The nature of that expert report was not dissimilar from the CRA Study in this proceeding. The IESO took that expert report and filed (in EB-2010-0002) over twenty pages of its own evidence entitled “*Export Transmission Service (ETS) Charge: Recommendation of an Appropriate ETS Charge for Ontario*”. As the title suggests, the IESO made a recommendation on an appropriate ETS charge, on the basis of the quantitative information from the CRA report and the IESO’s own qualitative analysis. At the oral hearing, Mr. Finkbeiner (on behalf of the IESO) sat on a witness panel with the CRA expert, and the panel was examined on the entire scope of the IESO case in that proceeding.
20. That is not how the IESO chose to proceed in this case. The IESO has made no recommendation on an appropriate ETS charge. There is no IESO evidence for Mr. Finkbeiner to be examined on. Mr. Finkbeiner is not an independent expert – he is a company witness, and having a company witness appear at a proceeding where the company has no evidence is not typical Board practice, for obvious reasons.
21. The concern raised by Mr. Finkbeiner’s appearance as a witness is that cross-examination or questioning of Mr. Finkbeiner could easily elicit new evidence as to the IESO’s position on an appropriate ETS charge or the IESO’s views on any of the key issues or elements raised in the proceeding (e.g., commentary on surplus baseload



generation, the IESO's views on the CRA model, the appropriate allocation of intertie congestion revenues, etc.). Allowing new evidence at this point in the proceeding, particularly evidence from the IESO, would be unfair to all parties.

22. Having raised this concern, the question is whether the risk of new evidence being brought forward is manageable or not. APPrO does not object to Mr. Finkbeiner's appearance as a company witness for the IESO if the Board thinks that it would be helpful to its determination of the issue. However, **APPrO submits that in order to ensure that Mr. Finkbeiner's testimony does not prejudice any other party, the Board should:**

- (a) **Ensure that Mr. Finkbeiner appear as part of a separate witness panel with the CRA witnesses. The IESO case in this proceeding consists of the CRA Study. Cross-examination on the IESO case should be centred on the CRA Study. Mr. Finkbeiner should not be permitted to sit alone as a sole company witness panel. That would only invite questions focused on the IESO's views and positions, which would amount to new evidence.**
- (b) **The other witness panels in this proceeding (i.e., the APPrO witness panel, and potentially an HQEM expert witness panel) should be permitted to sit as a witness panel(s) after the IESO panel, in order to be given an opportunity to address any new evidence raised by the IESO panel.**

### **Past Board Practice**

23. This is only the third time that the Board has established a process involving concurrent expert evidence. In the recent Enbridge proceeding where a concurrent expert panel

was examined (EB-2011-0354), Enbridge's experts sat in a witness panel with an expert retained by a coalition of consumer group intervenors. Enbridge had sought (in that case) to have its company witnesses sit with its expert witnesses as a single panel. The Board denied Enbridge's request, and required that Enbridge's company witnesses sit alone as a witness panel. The Board's rationale seemed to hinge on the Board's desire to have the independent expert evidence on the issue (cost of capital) kept separate from the company position, by allowing for both sets of evidence (the expert and company evidence) to be independently tested.

24. **APPrO submits that the need to independently test APPrO's company evidence here does not really exist.** The Navigant evidence makes a recommendation on an appropriate ETS charge, based on a number of factors. The Brookfield evidence filed by APPrO does not make a recommendation, but rather is meant to support one of the factors relied upon by Navigant via some fact-based evidence. Consequently, it makes sense to have the Brookfield witness sit with the Navigant witness.
25. **With respect to the IESO's case, as noted above, APPrO is of the view that Mr. Finkbeiner for the IESO ought to be sitting with the CRA witnesses in order to ensure that his testimony remains within the four corners of the CRA Study.**
26. Any concern about unnecessary duplication of expert testimony (i.e., having the experts sit twice – first as part of a concurrent witness panel and second as part of a company witness panel) can be overcome by simply restricting the examination of the concurrent witness panel to questions from the experts themselves (to each other), questions from Board counsel and questions from the Board Panel.

27. Finally, Procedural Order No. 5 in the Enbridge proceeding (EB-2011-0354) specifically mentioned the provision of an opening statement by the experts. Procedural Order No. 8 in this proceeding borrowed heavily from Procedural Order No. 5 in EB-2011-0354, but made no mention of an opening statement. APPrO is unsure whether this was deliberate or not, based on the Board’s perception of the utility of those opening statements in the Enbridge case. **In any event, APPrO submits that opening statements could be helpful in this proceeding.**
28. The Enbridge concurrent expert witness panel dealt with utility capital structure as a component of cost of capital – an issue that this Board is very familiar with. The nature of the evidence in this proceeding deals with issues and concepts that the Board does not routinely deal with, so a concise summary of the expert evidence (in the words of the experts themselves) could be of assistance – particularly given that at this point in the proceeding, the experts have had a chance to discuss and debate their evidence in the pre-hearing Experts’ Conference.

**Summary**

29. Consequently, for all the reasons noted above, APPrO submits that the order and composition of the witness panels be as follows:

Panel	Witnesses	Procedure
Concurrent Experts	Ira Shavel (CRA) Andy Baziliauskas (CRA) Cliff Hamal (Navigant)	<ul style="list-style-type: none"> <li>• 30 minute opening statement of CRA</li> <li>• 30 minute opening statement of Navigant</li> <li>• Questions from Board Counsel</li> <li>• Questions from Board Panel</li> <li>• Questions of CRA by Navigant</li> <li>• Questions of Navigant by CRA</li> </ul>

<b>Panel</b>	<b>Witnesses</b>	<b>Procedure</b>
IESO Panel	Darren Finkbeiner (IESO) Ira Shavel (CRA) Andy Baziliauskas (CRA)	<ul style="list-style-type: none"> <li>• Cross-examination by Parties</li> <li>• Cross-examination by Board Counsel</li> <li>• Questions from Board Panel</li> <li>• Re-examination</li> </ul>
HQEM Panel	John Todd (Elenchus) Michael Roger (Elenchus)	<ul style="list-style-type: none"> <li>• 30 minute opening statement</li> <li>• Cross-examination by Parties</li> <li>• Cross-examination from Board Panel</li> <li>• Re-examination</li> </ul>
APPrO Panel	Marc-André Laurin or Richard Bordeleau (Brookfield) Cliff Hamal (Navigant)	<ul style="list-style-type: none"> <li>• Cross-examination by Parties</li> <li>• Cross-examination by Board Counsel</li> <li>• Questions from Board Panel</li> <li>• Re-examination</li> </ul>

All of which is respectfully submitted this 18<sup>th</sup> day of January, 2013.

**ASSOCIATION OF POWER PRODUCERS OF ONTARIO**

By its Counsel,

*Original signed by*

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TO: All Parties in EB-2012-0031